CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2021 Term

DAMON WILLIS.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police arrested Petitioner Damon Willis on three separate occasions for possessing a firearm after having incurred a conviction for an offense punishable by more than one year in prison contrary to 18 U.S.C. § 922(g)(1). Officers testified at trial that Mr. Willis adamantly stated, as a "Sovereign Citizen," he could lawfully possess any gun he did not deface or take across state lines. The government used Mr. Willis's mistaken belief that he could possess a firearm to satisfy its burden to prove that petitioner knowingly possessed the firearms in two of the charges for which he did not directly admit knowing physical possession. The trial court instructed the jury the government did not have to prove Mr. Willis knew the law prohibited him from having a gun, an instruction this Court subsequently declared improper in *Rehaif v. United States*, 131 S. Ct. 2191 (2019), in the case of a man convicted as a non-citizen in possession of a firearm who claimed he did not know the student-visa he used to legally enter the United States had lapsed. Seven circuits have issued published decisions holding that *Rehaif* precludes judges from instructing juries that the government must prove a defendants knew membership in a category of persons listed in Section 922(g)(1) prohibited the possession of firearms.

In light of the foregoing, the issues presented in this case are as follows:

Does *Rehaif v. United States* preclude a jury instruction that the federal government must prove a defendant knew his prohibited status made it illegal to possess a firearm when he claims a mistaken belief as to the application of 18 U.S.C. §§922(g) and 924(a)(2)?

Did the instruction in this case deny Mr. Willis's Fifth and Sixth Amendment rights to present a complete defense?

LIST OF PARTIES

Petitioner Damon Willis was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, and Charles J. Banks, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States is represented by Acting United Sates Attorney Sayler Fleming and Assistant United States Attorney, Joshua M. Jones, Thomas Eagleton Courthouse, 111 South Tenth Street, Saint Louis, MO, 63102.

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Other Resources

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OPINION BELOW

The unpublished decisions of the United States Court of Appeals for the Eighth Circuit issued on July 1, 2021. It appears in the Appendix at page 1 and is also accessible at 851 Fed. Appx. 650.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion affirming Mr. Willis's conviction on July 1, 2021. The Court of Appeals denied his timely motion for rehearing on August 27, 2021. Appendix at 6. Justice Kavanaugh granted Petitioner's request for additional time to file a petition for a writ of certiorari up through January 24, 2022. Appendix at 7. Petitioner filed this petition within that time. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Amendment V, U.S. Const.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, U.S. Const.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C §922(g)(1)

"It shall be unlawful for any person—

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance[];
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
>
> (5) who, being an alien—
>
> > (A) is illegally or unlawfully in the United States; or
> > (B) except as provided in subsection (y7)&2), has been admitted to the United States under a nonimmigrant visa [];
>
> (6) who has been discharged from the Armed Forces under dishonorable conditions;
>
> (7) who, having been a citizen of the United States, has renounced his citizenship;
>
> (8) who is subject to a court order that –

(A) Was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) Restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §924(a)(2)

"Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in the title, imprisoned not more than 10 years, or both."

STATEMENT OF THE CASE

This case presents a recurrent question left in the wake of the Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The Court there struck down a jury instruction declaring that the government did not have to prove an accused knew he belonged to a class of persons identified in 18 U.S.C. §922(g) as being prohibited from possessing a firearm. Rehaif's defense asserted he did not realize his immigrant visa had lapsed at the time he possessed a firearm, which placed him in the category of non-citizens listed in Section 922(g)(5)(A) for whom possession of a firearm is a federal crime. In the wake of *Rehaif* seven circuits have held that it established a blanket rule that a district court must never instruct the jury that a defendant knew his or her membership within a prohibited category of persons listed in Section 922(g) made it illegal to possess a firearm.

Petitioner Willis's case illustrates the injustice in the position taken by at least seven circuits that the government need never prove defendants knew their membership in a category listed in Section 922(g) made it illegal for them to possess a firearm. The government here urged jurors to accept Mr. Willis's mistaken belief he could lawfully possess a firearm so long as he never moved it across state lines to meet its undisputed burden to prove he knowingly had physical possession in each count. At trial, the prosecution called police officers who arrested Petitioner on three separate occasions for possessing a gun after a felony conviction. The officers told jurors Mr. Willis was "adamant that, as long as a firearm was not defaced… and it had not – he had not taken it across state lines," he could possess it.

The uniform testimony of the officers as to Mr. Willis's fervent belief in the legality of his possession of a firearm prompted the Assistant United States Attorney trying the case to demand an instruction admonishing the jury that the government did not have to prove Mr. Willis knew it was

illegal for him to have a gun. The government submitted an instruction concerning the knowledge of "possessing" a gun under the law which provided,

> The mere knowing possession of a firearm by a previously convicted felon is a violation of the laws of the United States. It is not necessary, therefore, that the Government prove the defendant knew that it was unlawful for him to possess the firearm or to prove the defendant knew the firearm had traveled in interstate commerce. It is sufficient if you find, beyond a reasonable doubt that the defendant knowingly possessed the firearm.

The Court gave the instruction, justifying this decision by declaring it an accurate statement of law,

> [a]nd because the undertow in this case interjected by Mr. Willis in his various arrests is that he had a lawful right to possess the firearm even though it had traveled in interstate commerce, I think raises the issue and is appropriately addressed by a correct statement of the law.

The Assistant United States Attorney urged the jury to accept Mr. Willis's mistaken belief in the legality of his possession to satisfy its burden of proof to show he knowingly possessed each gun charged. The jury acquitted Mr. Willis on one count and convicted him of the others.

Prior to his sentencing, this Court in *Rehaif* struck down the very type of instruction the District Court gave Mr. Willis's jury. On direct appeal, Mr. Willis argued the instruction violated his Fifth and Sixth Amendment rights to present a complete defense based on his reasonable mistaken belief that his felon status did not prohibit him from possessing a firearm within the borders of a single state.

The Eighth Circuit rejected his claim, reasoning that *Rehaif* only requires the government to prove the defendant knew he had a prior felony conviction:

> In light of *Rehaif*, it was plain error to not present to the grand and petit juries the question whether Willis knew that he belonged to the relevant category of persons barred from possessing firearms—i.e., that he knew that he was a felon. . .
>
> These plain errors did not affect Willis's substantial rights, however, because he cannot show a reasonable probability that he would not have been charged or that he would have been acquitted, if the correct question had been presented. To demonstrate Willis's knowledge, the government has pointed to Willis's previous federal conviction for being a felon in possession of a firearm, his multiple state felony convictions, his several sentences exceeding one year, and his stipulation at trial that he was a felon. This record leaves no question that Willis knew that he previously had been convicted of a felony—regardless of whether he believed that the United

> States now lacked jurisdiction over him as a "sovereign citizen." Willis has not shown a reasonable probability that a grand or petit jury would have found otherwise.

Appendix at 2-3 (internal citations omitted).

Petitioner sought rehearing, arguing that the appellate panel failed to address his contention that the instruction charging the jury it did not have to find that he knew the law prohibited him from having a gun denied his constitutional rights to a complete defense based on his reasonable mistaken belief that his felon status did not preclude him from possessing a firearm so long as he did not carry it across state lines. He also argued that the panel's decision conflicted with this Court's endorsement of the "mistake of law" defense in *Rehaif*. The Court of Appeals denied rehearing. Appendix at 6. Justice Kavanaugh granted petitioner's request to file his petition for a writ of certiorari up through January 24, 2022. Appendix 7.

REASONS FOR GRANTING CERTIORARI

1 The Court should grant certiorari to decide whether *Rehaif* eliminated any burden on the United States to prove a defendant knew that inclusion within a listed category in §922(g) made it illegal to possess a firearm.

This Court granted certiorari in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), to decide "whether, in prosecutions under §922(g) and §924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm." *Id.* at 2194. Each of the ten circuits to address the question up to that time had held the government had no such burden. *Id.* at 2210 & n. 6. Rehaif stood convicted as a non-citizen "illegally or unlawfully in the United States," the category listed in Section 922(g)(5)(A) after the trial court instructed his jury that the government "was not required to prove "that Rehaif "knew that he was illegally or unlawfully in the United States." *Id.* at 2194. Rehaif claimed the government had to prove he knew the student visa by which he originally entered this Country lawfully had been suspended. *Id.* This Court held that the Government was required to prove not only that Rehaif knowingly possessed a firearm under 922(g) but also that he knew he was a member of the prohibited category of persons listed therein for whom possession was prohibited. *Id.* at 2200.

Petitioner Willis likewise seeks certiorari to address the ruling of each of the seven circuits that have addressed a related and recurrent question: whether the Government must prove defendants charged under Section 922(g) knew not only of their membership in a category listed therein but also that this membership made it illegal for them to possess a firearm. The mistaken belief the petitioner in *Rehaif* raised did not require the Court to decide if the government had to prove he knew it was a crime for non-citizens illegally in the country to possess a firearm. His claimed mistaken belief related solely to his charged membership in the prohibited category in Section 922(g). Mr. Willis's case presents the perfect vehicle by which this Court can examine this issue because the Government itself relied on Mr.

Willis's adamant yet mistaken belief that he could possess a firearm so long as he did not take it across state lines to establish another element all parties agree the government must prove—namely, that the defendant knowingly possessed the firearm(s) in question.

This Court in *Rehaif* confirmed that the definition of the offense of unlawful firearm possession comes from both Section 922(g), prohibiting certain conduct by certain persons, and from Section 924(a)(2) which criminalizes the "knowing violation" of that prohibition. *Id.* at 2195. With some omissions not relevant here, the Court identified four elements in Section 922(g):

> "a status element (in [*Rehaif*], "being an alien . . . illegally or unlawfully in the United States"); (2) a possession element (to "possess"); (3) a jurisdictional element ("in or affecting commerce"); and (4) a firearm element[.]"

Id. at 2195-96. This Court observed that the requirement of possessing a firearm "affecting interstate commerce" relates only to the federal court's jurisdiction and is not something a jury must find a defendant knew. *Id.* the parties in *Rehaif* did not dispute this observation, yet this Court did not directly address the possibility that a mistaken belief engendered by the statutory phrasing of the "in or affecting commerce" might lead a defendant to misapprehend the scope of conduct prohibited by Section 922(g). The *Rehaif* decision stressed the importance of the scienter requirement in Section 924(a)(2) as vital to the statute and gave no indication that lay persons would realize Congress did not intend that one charged under Section 924(a)(2) had to knowingly possess a firearm "in or affecting commerce":

> Applying the word "knowingly" to the defendant's status in § 922(g) helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts . . . It is therefore the defendant's status and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful.

Rehaif, 139 S. Ct. at 2197.

Beyond the statutory text, this Court's conclusion that Section 922(g) incorporated a requirement of guilty knowledge reflected a "basic principle that underlies the criminal law, namely, the importance of showing ... "a vicious will." Yet, neither Section 922(g) nor Section 924(a)(2) provide any indication

to the public that the "in or affecting commerce" phrasing is *not* something a defendant must violate "knowingly." The *Rehaif* decision confirmed that the general maxim that "ignorance of the law is no excuse" does not apply when a mistake as to a collateral matter impedes his full understanding of his culpability. The parties in *Rehaif* did not dispute the element of possessing a firearm "in or affecting interstate commerce." *Id.* at 2196 ("No one here claims that the word 'knowingly' modifies the statute's jurisdictional element").

However, to state the obvious, this Court had not previously indicated that Section 922(a)(g)'s prohibition of possessing a firearm "in or affecting commerce" was no more than a jurisdictional element or that it had no bearing on the scope of conduct made criminal at the time of Mr. Willis's charged conduct. Nor did the Court in *Rehaif* address the question of whether a lay person could reasonably misconstrue the "in or affecting commerce" as carving an exception for lawful possession of a firearm a person carefully possessed solely within the borders of a single state.

Like defendant Rehaif's mistaken belief in the legality of his continued presence in the United States, Mr. Willis's mistake as to the legality of possessing a firearm within the borders of one state related to a "collateral matter" that led to "his misunderstanding the full significance of his conduct," *Rehaif*, 139 S. Ct. 2198. His mistaken understanding negated an element of the offense—albeit, in Mr. Willis's case, an element that trained counsel would discern as something one an offender does not need to know to be prosecuted. *See id.* at 2196. This Court noted in *Rehaif* that, "[b]ecause jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter." *Id.* However, the ruling in *Rehaif* did not categorically declare that a layperson's mistake of law could not arise from the statutory language reciting a technical jurisdictional element not labeled as such in Section 922(g)(6). Quite to the contrary, the Court noted that it "expressed no view . . .about what precisely the Government must prove

to establish a defendant's knowledge of status in respect to *other §922(g) provisions not at issue here*." *Id.* at 2200 (emphasis added).

Petitioner's claim warrants certiorari even as an unpublished opinion reviewed for plain error

Although Petitioner's objection was not preserved at trial, this does not render this case an improper vehicle for this Court to address the issue as plain error under *United States v. Olano*, 507 U.S. 725, 733 (1993). *See Tapia v. United States*, 564 U.S. 319 (2011) (granting certiorari to address unpublished Eleventh Circuit ruling on plain error claim in *United States v. Tapia*, 376 Fed. Appx. 707 (9th Cir. 2010)). Relief from plain error is warranted when a defendant shows (a) error, (b) that is plain, (c) that "affected the appellant's substantial rights," (4) and that the appellate court should remedy it because it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* An error is deemed to be plain if case law makes it so at the time of the defendant's direct appeal. *Henderson v. United States*, 568 U.S. 266, 269 (2013). The Eighth Circuit found the instruction in Mr. Willis's case was plainly erroneous under *Rehaif*, which the government did not deny. Appendix at 2-3.

Mr. Willis easily satisfies prong three of the *Olano* test requiring a showing that the error affected his "substantial rights," which include the Fifth and Sixth Amendment rights to present a complete defense to the government's charge. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "[T]he right to put the government to its burden in a jury trial that comports with the Sixth Amendment before facing criminal punishment" stands "among the most essential" constitutional protections. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1409 (2020) (Sotomayor, J., concurring). The substantial rights prong of plain error review is generally satisfied by establishing the reasonable probability of a different result but for the error. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). Mr. Willis's case easily establishes the probability of a different result had the jury been instructed that the government had to prove the defendant knew of his prohibited status, given the Assistant United States

Attorney's express reliance on Mr. Willis's adamant belief in the legality of his conduct to prove his knowing possession of the firearms in question. That circumstance also satisfies the fourth *Olano* prong by establishing that the error casts a pall on the fairness, integrity, and public reputation of judicial proceeding. Gross unfairness appears in this case because the government expressly exploited Mr. Willis's reasonably mistaken belief in the legality of his conduct to prove the element of knowing physical possession of the firearm while simultaneously getting the judge to tell the jury it had no obligation to prove Mr. Willis knew his possession of the firearm was illegal.

In short, Mr. Willis's failure to preserve his objection at the time of his pre-*Rehaif* trial does not negate the propriety of using this case to decide the issue presented.

In *Rehaif*'s wake, at least seven circuits hold the government need not prove that a defendant knew membership in a prohibited class makes it a crime to have a firearm.

The fact that seven circuits in published opinions have already ruled against the legal claim Petitioner raises does not negate the urgency for this Court to review their resolution of an issue that the Court in *Rehaif* did not have to resolve. *See United States v. Benton*, 988 F.3d 1231, 1240-41 (10th Cir. 2021); *United States v. Bryant*, 976 F.3d 165, 172-73 (2nd Cir. 2020); *United States v. Collins*, 982 F.3d 236, 242 n.2 (4th Cir. 2020); *United States v. Bowens*, 938 F.3d 790, 792 (6th Cir. 2019); *United States v. Johnson,* 981 F. 3d 1171, 1189 (11th Cir. 2020); *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020); *United States v. Singh*, 979 F.3d 697, 727 (9th Cir. 2020). *See also United States v. Robinson*, 982 F.3d 1181, 1187 (8th Cir. 2020) (rejecting defendant's belief he thought he could possess a firearm citing *Maez* and *Singh*); *United States v. Brown*, 845 Fed. Appx. 1, 3 (D.C. Cir. 2021) (unpublished). This Court granted certiorari in *Rehaif* despite the fact ten circuits had already unanimously rejected the position this Court adopted in that case.

None of these circuits grappled with the salient circumstances of a lay person who misperceived the statutory language prohibiting the knowing possession of a firearm "in or affecting commerce" as

carving out a legal space for persons who possess a firearm solely within the boundaries of a single state. Nor did these circuits consider the issue in the context of a case where the government itself used the defendant's mistake as to the significance of that language to prove "knowing" possession that all parties agree the government is obliged to prove—in fact, the Eighth Circuit itself did not address the government's use of the defendant's mistaken belief in its opinion despite petitioner raising it.

No interest of justice is served by waiting for other circuits to consider the issue separately—indeed, the Tenth Circuit encouraged "judicial modesty [that] should make us reluctant to reject that uniform judgment." *Benton*, 988 F.3d at 1240-1241, citing and quoting *Exby-Stolley v. Bd. Of Cnty. Cmm'rs*, 979F.3d 784, 810 (10th Cir. 2020) (en banc). Prosecutions for unlawful possession under Section 922(g) make up a dominant part of federal criminal prosecutions. Federal convictions of persons who possess firearms after a prior felony conviction numbered 6,782 convictions in fiscal year 2020—accounting for over 10% of all Guidelines sentences reported to the United States Sentencing Commission. *See* U.S. Sentencing Commission, *Quick Facts Felon in Possession of a Firearm*, 1 (FY 2020). The issue Petitioner raises will undoubtedly continue to recure until this Court resolves it.

CONCLUSION

WHEREFORE, Petitioner requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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